
**Complaint of the David Zeller Insurance Agency, Inc. and the
Kunevich & Lau Insurance Agency
Against Commerce Insurance Company
Docket No. G2004-01**

Order of Dismissal

I. Introduction and Procedural History

On January 23, 2004, through counsel, two unidentified Exclusive Representative Producers (“ERPs”) assigned to the Commerce Insurance Company (“Commerce”) complained to the Commissioner of Insurance (“Commissioner”) that they could not offer a group discount to members of the American Automobile Association (“AAA”) who purchase private passenger automobile insurance through their agencies. The letter alleged that the restriction on offering the discount violated G.L. c. 175, §§193R, 113H and G. L. c. 176D. It asked that a hearing take place before approval of an AAA group marketing plan for use in 2004, to verify compliance with the laws, “without discrimination.” I was designated presiding officer. On February 18, I issued a preliminary order (the “Order”) which requested the ERPs to clarify the statutory bases that might support their request for a hearing, and to provide a chronology of the facts about, and copies of documents relating to, any incident on which the complaint was based. The Order instructed Commerce to file a response to the ERPs statement, and advised any other entity that wished to intervene or participate to file a petition to do so by March 9. The Order also scheduled a preliminary conference for March 16.

Leonard Fisher, Esq. represents the ERPs, and Louise McCarthy, Esq. represents Commerce. Both the ERPs and Commerce timely submitted responses to the preliminary order. No other person sought to intervene or participate in this matter. The ERPs' response, dated February 25 (the "February 25 Statement"), among other things, identified the complainants as the David E. Zeller Insurance Agency, Inc. ("Zeller Agency"), located in Lynn, Massachusetts; and the Kunevich & Lau Insurance Agency ("Kunevich & Lau"), with an office in Brookline, Massachusetts. Commerce filed its statement on March 11. On March 16, at the preliminary conference, the ERPs filed a rebuttal (the "March 16 Statement") to Commerce's submission. Both parties argued the question of administrative jurisdiction. David Zeller, president of the Zeller Agency, and Patrick McDonald, a Commerce vice-president, offered additional information. At the close of the conference, I ordered Commerce to file a response to the ERPs' rebuttal; it submitted that response on March 24.

II. The Parties' Positions

The statements submitted by the ERPs and Commerce, and the arguments made at the preliminary conference on March 16, are summarized below.

A. The ERPs

The ERPs' February 25 Statement included the facts underlying their request for a hearing and cited the statutes on which they rely to support it; the March 16 Statement set out additional grounds for their request. The Zeller Agency was a participating agency for the AAA group marketing program until November 2002. At that time it was suspended from the program for a year, and has not been reinstated. The March 16 Statement asserted that the allegations that led to the suspension have never been proven, and that a hearing would take the agency out of a "black hole." Kunevich & Lau was assigned to Commerce in December 2002 and since then has sought, unsuccessfully, to become a participating agency for the AAA program. The March 16 Statement alleges that Commerce has indicated no reason to discriminate against that agency.

The ERPs seek a hearing on their complaint under G.L. c. 175, §193R ("§193R"), arguing that the statute states that every person "having a proper insurable interest" is entitled to participate in the group plan, and that Commerce agents whose clients include AAA members are persons who have such a "proper insurable interest." The March 16

Statement further asserts that Commerce, in 1995, required all its agents and brokers to sign participation agreements with AAA. Further, they comment that case notes to §193R indicate that “insurance agents and brokers have standing.”

The ERPs argue, as well, that under G.L. c. 175, §113H (“§113H”) a servicing carrier “shall service each agent or broker under substantially the same contract and terms and conditions governing their normal agency relationship.” In addition, the ERPs assert, Commonwealth Automobile Reinsurers (“CAR”), in Rule 13 of its Rules of Operation (“Rule 13”), requires servicing carriers to use the same policy forms and to provide the same level and type of service to all policies, whether they are written voluntarily or through the residual market. In the March 16 Statement, the ERPs argue that under CAR Rule 14 A.2.b every ERP must become an affiliate of AAA Insurance Agency, Inc. They assert that because CAR has not reported experience with group auto plans, the Division of Insurance should “expedite any conflict within the statutes,” thus ensuring faster resolution and cost containment.

The March 16 Statement also alleges that because automobile insurance is mandatory in Massachusetts, it falls within the principle of public accommodation. In that case, the ERPs argue, no private contract can permit discrimination. In order for all AAA members to participate in the group discount plan, they assert, all Commerce agents and brokers, including ERPs, must be allowed to place members in that plan.

B. Commerce

Commerce argues that the ERPs are not entitled to an administrative hearing in this matter because none of their submissions identifies any grounds that would support holding such a hearing. It asks the Commissioner to deny their request.

Commerce states that since 1995, pursuant to §193R, it has offered a group marketing program to members of certain divisions of the AAA. The group program discounts the automobile insurance premiums AAA members would otherwise pay under the Commissioner’s fixed and established rates. Most recently, it notes, the Commissioner approved a five percent discount for AAA members on policies effective on or after January 1, 2004. Commerce asserts that to support the continued offering of the program, it must demonstrate that the experience of the group warrants the discount.

According to Commerce, the AAA group plan is marketed through participating AAA insurance agencies (“PAAAIAs”), with which Commerce enters into a standard agency contract. At this time there are four PAAAIAs, each servicing a region. The PAAAIAs then determine which additional agents or brokers, both voluntary agents and ERPs, will participate in servicing the AAA group program, and enter into Participation Agreements with those agents or brokers.¹ The Participation Agreements allow the PAAAIAs to suspend a participating agent’s or broker’s right to place additional policies in the AAA group program. Commerce is not a party to the Participation Agreements between the PAAAIAs and the participating agents or brokers.

Commerce states that in 1996 the Zeller Agency entered into a Participation Agreement with a PAAIA. In 2002, the PAAIA suspended the Zeller Agency’s authority to place additional policies in the AAA group marketing program, but permitted it to service renewal policies written through that plan.² In 2003, the Zeller Agency sought, without success, to remove the suspension; it then complained about the suspension to the Division of Insurance (“Division”). Commerce states that the Division requested information from it about the Zeller Agency, but found no reason to require Commerce to offer the AAA group plan through the Zeller Agency. It notes that, of the seven insurance agencies in Lynn that represent Commerce, five participate fully in the AAA group plan, while the Zeller Agency participates on a limited basis.

Kunevich & Lau, states Commerce, was assigned to it as an ERP in December 2002. A PAAIA evaluated Kunevich & Lau at that time, and determined that it did not want to offer the agency a Participation Agreement. Commerce notes that Kunevich & Lau has two offices; it is one of four agencies that represent Commerce in Brookline and one of six agencies that represent it in Norwood. Two of the Commerce agencies in Brookline offer the AAA group program. Kunevich & Lau is one of two that do not. In Norwood, all agencies that represent Commerce, except Kunevich & Lau, offer the AAA group program.

¹ Commerce, in its written submission, refers to agents and brokers. However, effective January 1, 2003, legislation now codified as G.L. c. 175, §§162G through 162X changed the system for licensing entities that sell insurance, replacing the dual agent and broker licensing scheme with a single producer license.

² Commerce states that the suspension was based primarily on improper advertising practices.

Commerce argues that it offers the AAA discount to all AAA members in an equitable and non-discriminatory manner. Addressing the ERPs' position that insurance agencies whose clients include AAA members have an insurable interest to participate, Commerce asserts that §193R does not give an agent, whether voluntary or an ERP, a right by virtue of that status to participate in the group program. Rather, it argues, §193R requires that insurers offer a group program to individual insureds with a proper insurable interest, in this case policyholders who are members of AAA. Commerce notes that the ERPs do not allege that Commerce has denied any individual insured an opportunity to participate in the group program.

Commerce disputes the ERPs' position that AAA members expect to get the group discount through any Commerce agent of their choice. It argues that AAA members have a right to receive the discount, but only if they purchase insurance through a participating agency. Commerce notes that both its ERPs and voluntary agents may choose whether to participate in the group marketing program, and that some ERPs and voluntary agents have elected not to do so. It asserts further that, because other Commerce agents or brokers in the cities and towns where the Zeller Agency and Kunevich & Law operate do participate in marketing the group program, the discount is widely available to AAA members who want to become Commerce customers.

Commerce argues that the ERPs are not entitled to a hearing on their complaints at the Division because the statutes or rules on which they rely to support their request do not provide a basis for a hearing. It asserts that §193R does not cover issues relating to the marketing of group programs, and reiterates that the ERPs do not allege that any individual has been denied participation in the AAA group. Nothing in that section, Commerce argues, supports the ERPs request for an administrative hearing.

With respect to the requirement that, pursuant to §113H, Servicing Carriers shall service ERPs under substantially the same contract and terms and conditions of their normal (*i.e.*, voluntary) agency relationship, Commerce states that it complies with the statute. It argues that the ERPs have not clearly identified any basis for an alleged violation of §113H. Commerce asserts as well that the ERPs make reference to CAR Rule 13 as a basis for their request for a hearing but, at the same time, argue that CAR has no jurisdiction over this matter. It notes that the ERPs state that neither the CAR Plan of

Operation nor the CAR Rules refer to the handling of group discount programs. To the extent that Rule 13 requires insurers to provide the same services to policies ceded to the residual market as they do to policies retained voluntarily, Commerce states that the AAA discount is available to all eligible insureds without regard to whether the policy is ceded or retained.

Addressing the ERPs' allegations that Commerce has engaged in unfair discrimination and prohibited trade practices in violation of G. L. c. 176D ("c. 176D"), Commerce notes that the statute does not provide a private right of action for individuals, but grants the Commissioner a right to initiate proceedings. Therefore it does not support the ERPs' request for an administrative hearing. In any event, Commerce argues, the ERPs assert no facts that might support a finding of unfair discrimination or commission of a prohibited trade practice; they do not claim that any eligible AAA member has been denied participation in the group marketing program. Commerce argues, as well, that the ERPs' allegation that this matter relates to cost containment appears to refer to an issue that is part of the process for fixing and establishing private passenger automobile rates, and does not support this request for an administrative hearing.

Finally, Commerce argues, the ERPs are not entitled to a hearing at the Division on complaints that are, in reality, contractual disputes between their particular agencies and PAAAIAs. It comments that, if there were such an entitlement, the Division would be inundated with hearing requests that would tax its limited resources.

III. Discussion and Analysis

The question before me is whether the complaining ERPs should receive an administrative hearing on the issue of their eligibility for participating agent status which, if granted, would enable them to offer the AAA group marketing program to AAA members who apply for insurance through their agencies. After considering the parties' written and oral presentations, I conclude that the complaint does not establish a basis for an administrative hearing before the Commissioner at this time. Therefore, I deny the ERPs request and dismiss this matter.

Initially, the ERPs sought relief in the form of a hearing at the Division before a decision was made to approve the AAA group marketing program for 2004. However, §193R, which governs such programs, does not require a hearing before a plan is

approved, and the ERPs did not identify any other statute that would support its request for a hearing on the proposed group program.³ Even if §193R included some provision for hearings, its principal focus is on the standards that such programs must meet. While it establishes that group marketing programs must allow eligible members of the group to participate, it prescribes no procedures for marketing such programs. Assuming, *arguendo*, that failure to comply with the requirements of §193R might provide a basis for a complaint from an AAA member to the Commissioner, neither the Zeller Agency nor Kunevich & Lau asserts that it is a member who has not been allowed to participate in the AAA group program. I am not persuaded that either agency, by virtue of its status as a Commerce representative, has an interest sufficient to support a claim of violations of §193R.

The ERPs argue that G.L. c. 175, §113H allows them to complain directly to the Commissioner about the actions of an insurer and to obtain a hearing on their complaint. That statute, which establishes the residual market plan for private passenger automobile insurance, authorizes aggrieved persons to “bring a complaint to the commissioner alleging unfair or unreasonable or improper practices by any insurer, agent or broker.” The commissioner, if she finds that “any activities or practices of any insurer, agent or broker in connection with the submission or operation of such plan is unfair or unreasonable or inconsistent with the provisions of this section” may issue a written order requiring the discontinuance of such activity or practice.

The ERPs’ position that §113H provides for a hearing on this matter is based on alleged violations by Commerce of the statute and CAR Rules governing the relationships between Commerce, as a Servicing Carrier, and its ERPs and its policyholders assigned to the residual market. Their arguments do not persuade me that §113H supports their request for a hearing. First, the CAR Rules address the regulation of the residual market but, as the ERPs and Commerce agree, do not regulate group marketing programs. Rule 13.B.1 requires Servicing Carriers to send to operators insured through CAR the same policies and forms that they use for other motor vehicle business, and to provide the same level and type of service to policies issued through CAR as they provided to policies issued

³ In contrast, G.L. c. 175, §113H, the statute which governs insurance company requests to deviate downward from the fixed-and-established rates requires notice and a public hearing before approval.

voluntarily. The ERPs do not allege that Commerce provides different forms or services to their policyholders, and do not dispute Commerce's statement that it complies with CAR Rule 13.

Second, the ERPs argue that CAR Rule 14.A.2.b requires that all Commerce agents become affiliated with the AAA Insurance Agency, Inc. That rule addresses the consequences if an ERP is found to have a material and continuing proprietary or management interest in another agency that has a voluntary or involuntary appointment to a Servicing Carrier. Commerce argues that Rule 14.A.2.b is irrelevant, because the participation agreement between a PAAIA and another agency does not establish any shared proprietary or management interest between them. Nothing in the ERPs submissions challenges that statement.

Further, because CAR is the entity authorized by statute to administer the assigned risk plan, to the extent that the ERPs base their request for a hearing on alleged violations of the CAR Rules, they raise issues that should be addressed, in the first instance, at CAR.⁴ The ERPs argue that because CAR has had no experience with group discount programs a hearing before the Division would result in faster resolution of their issues with the marketing of the AAA group program. The Zeller Agency further argues that seeking a decision from CAR would delay the process of review at the Division. Neither argument is persuasive.

Although I find that the ERPs' alleged violations of CAR Rules 13 and 14 do not entitle them to a hearing under §113H, §113H hearings are not constrained to claims alleging violations of CAR Rules. They do, however, require that the complaint relate to the operation of the assigned risk plan. *See, e.g.,* the Decision and Order in *Hanover Insurance Company v. Arbella Mutual Insurance Company*, DOI Docket No. C2001-04, 10-11, *aff'd* on appeal, Suffolk Superior Court, August 18, 2003 (Sanders, J.). The real issue in this matter is the operation of the AAA group marketing program as it relates to two individual Commerce ERPs. Their complaint seeks to resolve two separate disputes: 1) whether the Zeller Agency's suspension as a participating agency should be lifted by its PAAIA; and 2) whether Kunevich & Lau should be offered a Participation Agreement.

⁴ G.L. c. 175, §113H (E) ¶6, provides for an appeal to the Commissioner from a ruling or decision of CAR that refers to the operation of the assigned risk plan.

Assuming, *arguendo*, that the ERPs are aggrieved persons who may bring a complaint to the Commissioner, neither has established a connection between the acts underlying its complaint and the operation of the residual market plan. Therefore, §113H does not support their request for a hearing.

Chapter 176D prohibits persons in the business of insurance from, in connection with that business, engaging in trade practices that are defined as unfair methods of competition or unfair or deceptive acts or practices. The precise nature of the ERPs assertion that a hearing should be held on alleged violations of c. 176D is unclear; the thrust of their argument is that the practice of marketing the AAA discount program through a limited number of Commerce ERPs and voluntary agents is discriminatory against AAA members and the agencies that represent Commerce. Chapter 176D does not authorize private parties to obtain a hearing on alleged violations of the statute; responsibility for enforcing its provisions in an administrative forum lies with the Commissioner. Even if the ERPs had standing to pursue an action under c. 176D, they have not demonstrated their standing to pursue the issue of entitlement on behalf of AAA members.

Although c. 176D does not support the ERPs request for a hearing, I have reviewed their complaints to consider whether the issues they raise are appropriate for further inquiry by the Division, pursuant to c. 176 D, §5. The ERPs argue that AAA members should be able to obtain the group discount from any Commerce agent with whom they choose to do business and that, in order to ensure that the discount is available to all AAA members, all Commerce agents and brokers must be allowed to participate in the AAA group program. Commerce argues that it offers the AAA discount in an equitable and nondiscriminatory fashion to all AAA members.

The ERPs offer no legal support for the premise that AAA members are entitled to obtain the discount through any Commerce producer. The group automobile insurance discount is, according to Commerce, a benefit that the regional AAA clubs offer to their membership. The structure of that benefit program must comply with the statutory requirements of §193R; as a matter of public policy it should also satisfy concerns about access to programs sponsored by membership organizations, such as AAA, that do not provide the benefit directly to the members but require them to obtain the insurance from

Commerce. As noted above, no claim is made in this matter that the AAA discount program is not available to its members. Further, neither of the complaints on which the ERPs request a hearing relates to their position that AAA members are entitled to purchasing options that differ from those offered by the AAA group program. Their complaints arise from specific issues between them and PAAAIAs, and the relief they seek in this proceeding addresses only that relationship.

The ERPs also offer no persuasive argument that offering the AAA group program through some, but not all, Commerce producers is discriminatory. Commerce points out that not all of its producers choose to participate in the group marketing program, and that some who participated in the past have withdrawn from it. Commerce and the ERPs agree that the contracts between Commerce and its producers are separate from the contracts between Commerce producers and the PAAAIAs, and that the former makes no reference to the latter. Because commissions for business written through the group marketing program are lower from those paid on non-group business, participation in the program will have financial implications for producers. It is, therefore, reasonable to expect that not all producers will choose to participate in the group marketing program, or to apply for such participation. No argument has been put forth that all producers should be required to participate in the AAA group program, regardless of their individual preferences. Kunevich & Lau makes no allegation that the process of reviewing potential participating agencies is unreasonable or was unfairly applied to it.

The ERPs, further addressing the question of access to the AAA group program, assert that in 1995 Commerce required all its agents and brokers to enter into participation agreements. That history does not, by itself, support the ERPs position that, to ensure AAA members access to the discount, every Commerce agent must be able to place customers in the group program. Compliance with the §193R requires that all eligible members of the group must be allowed to participate; it is reasonable to expect marketing arrangements for such programs to be structured in a way that will inform all eligible participants about the program and offer a reasonably convenient way to enroll in it. It is undisputed that Commerce has other producers who participate in the AAA group program in the communities where the Zeller Agency and Kunevich & Lau have offices. No showing has been made that consumers in those communities are unable to access the

AAA program.⁵ On the basis of the ERPs' general allegations, I find no reason to refer the marketing of the AAA group program for further investigation of possible violations of c. 176D. If, however, upon further consideration, the ERPs have reason to believe that the PAAAIAs in question have engaged in practices that may violate G.L. c. 176D, they may bring the matters to the attention of the Division's Market Conduct Unit, or explore their options under Massachusetts consumer protection statutes.

The initial request for a hearing in this matter framed the matter in dispute as the authority of two unidentified Commerce ERPs to offer the AAA group marketing program to applicants for insurance who are AAA members. The request provided none of the facts underlying that claim; it was therefore not possible to determine whether it raised an issue that should be the subject of a hearing at the Division. Because the Commissioner has an interest in ensuring that group discount plans satisfy the statutory requirements, a request was made for additional information. The February 25 Statement demonstrated that the request for a hearing focuses on the specific relationship between two ERPs appointed to Commerce and the AAA Insurance Agency, or agencies, which are authorized to enroll other agents and to oversee their activities as they relate to the AAA discount program. The two complaints, however, arise from different fact patterns.

The Zeller Agency was a participating agency in the AAA discount program until some time in 2002, when it was suspended by its PAAIA. It still has limited authority to offer the AAA discount to its customers who received it before the suspension. The Zeller Agency's goal is to remove its suspension from the AAA discount program; it asserts that the violations that gave rise to that suspension have never been proven. At the conference, the Zeller Agency urged that holding a hearing at the Division would expedite resolution of the issues that led to its suspension.⁶ The Zeller Agency's complaint arises from its attempts to resolve a dispute arising from the contractual obligations created under the Participation Agreement between the Zeller Agency and its PAAIA, a contract to which

⁵ Mr. Zeller asserts that, because his agency has staff who speak Russian and Spanish, it is able to provide services to particular immigrant populations. He questions whether other agencies can offer customers the same type of service.

⁶ Commerce, in its response to the ERPs' initial statement, comments that in 2003 the Zeller Agency complained to the Division of Insurance about its suspension. Mr. Zeller did not address the status of that complaint.

*Commerce is not a party.⁷ Furthermore, the Zeller Agency has already complained to the Division about that suspension; it offered no information on the status of that complaint.

Kunevich & Lau's claim arises from the refusal of the PAAAIA that was authorized to review Kunevich & Lau's request to participate in the AAA group program to approve that request. Although the February 18 order asked for a chronological statement of the specific facts on which the complaint was based, a statement of the legal theories that support the claims, and copies of all documents or records relating to any act that formed the basis for the complaint, the February 25 statement provided no specific information about the history of the relationship between Kunevich & Lau and any PAAAIA.⁸ It offers no facts that might support a conclusion that the alleged refusal to contract is something other than a dispute arising out of contract law. The Division, however, does not have general jurisdiction over contractual disputes between producers and insurers.⁹ To the extent that the ERPs seek relief from the PAAAIAs under principles of contract law, the administrative forum is not appropriate.

IV. Conclusion

For the above reasons, the request of the David E. Zeller Insurance Agency, Inc. and the Kunevich & Lau Insurance Agency for a hearing is denied, and this matter is dismissed.

Dated: June 29, 2004

Jean F. Farrington
Presiding Officer

Pursuant to G.L. c. 26 §7, this decision may be appealed to the Commissioner of Insurance within three days.

⁷ At the preliminary conference, Mr. Zeller identified his PAAAIA as the AAA Insurance Agency, Inc., located in Rhode Island.

⁸ The PAAAIA that reviewed Kunevich and Lau was not identified in the ERPs submissions or at the conference.

⁹ As Commerce points out, if the Division had such general authority to hear such contract disputes, it would be inundated with hearing requests.